BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 09-01

MITSUI O.S.K. LINES, LTD.,

COMPLAINANT,

v.

GLOBAL LINK LOGISTICS, INC.; OLYMPUS PARTNERS, L.P.; OLYMPUS GROWTH FUND III, L.P.; OLYMPUS EXECUTIVE FUND, L.P.; LOUIS J. MISCHIANTI; DAVID CARDENAS; KEITH HEFFERNAN; CJR WORLD ENTERPRISES, INC.; and CHAD J. ROSENBERG,

RESPONDENTS.

RESPONDENT AND CROSS COMPLAINANT GLOBAL LINK LOGISTICS, INC.'S REPLY BRIEF IN SUPPORT OF ITS COUNTERCLAIM AGAINST MITSUI O.S.K. LINES

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More than four years after filing a Complaint in which it alleged that Global Link engaged in split routing without its knowledge or consent, MOL now concedes that the entire premise of its Complaint is false and, in fact, senior MOL personnel not only knew about the split routing at issue but were complicit in it from the very beginning. Rather than beg the Commission's indulgence for having wasted four years of its time and for having subjected the Respondents to hundreds of thousands of dollars in unnecessary attorneys' fees, instead, MOL incredibly still insists that it is entitled to a windfall of approximately $20 million dollars as a result of having engaged in the split routing at issue. Because MOL has overcharged Global Link for shipments under the service contracts at issue, refused to file the agreed-upon rates in its service contracts or tariffs and willfully engaged in the practice of split routing over an extended period of years, then seeking to collect rates contrary to the ones agreed to by the parties, Global Link is entitled to reparations for its damages.

Relevant Facts

MOL's abrupt "about face" in its Reply Brief warrants recounting of how the parties came to be in this situation more than four years, hundreds of thousands of dollars in attorneys' fees, and millions of pages of discovery after MOL filed its Complaint.

In May of 2009, MOL filed a Verified Complaint with the Commission asserting that Global Link had engaged in split routing dating back to 2004 without MOL's knowledge or consent. At that time, three months before MOL's Complaint was filed, the Arbitration Panel in the case against Global Link's prior owners had already issued its Partial Final Award in which it determined that "there is clear evidence that a senior sales representative of Mitsui knew that Global Link was engaged in split-routing, and Mitsui did not object – indeed Mitsui encouraged continuation of the practice -- because Mitsui preferred not to be bothered with negotiating a multiplicity of door points." Arbitration Award at 10, February 2, 2009 (GLL App. 71).

MOL nonetheless has insisted throughout this lengthy proceeding that there is no evidence to suggest that it knew of or was complicit in the widespread split routing that had occurred since to 2004. Indeed, MOL's General Counsel submitted a sworn Declaration stating that the first time anyone from MOL had even heard of split routing was in conjunction with a subpoena that that was issued in that arbitration hearing. *See* Kevin Hartmann Declaration at ¶ 16, February 17, 2013 (MOL App. 1632). He further provided sworn testimony that MOL had conducted a "thorough investigation" which confirmed that MOL had no knowledge of, and was not complicit, in the widespread split routing. MOL Proposed Finding of Fact ("MOL FoF") 33.

MOL continued to maintain that position even after the depositions of Paul McClintock and Rebecca Yang were taken during which they were extensively questioned about emails, truckline and shipping delivery orders, and other communications clearly evidencing MOL's

participation in the split routing practices at issue. Rather than express surprise and dismay at the overwhelming evidence belying its contention that MOL knew nothing about split routing until 2008, MOL continued to maintain this steadfastly implausible position through their initial submission to the Presiding Judge on January 11, 2013.

Indeed, it was not until its Reply Brief on May 1, 2013, that MOL finally conceded that its long held position was wholly untenable, if not ridiculous. At that point, when confronted with the voluminous evidence showing that it was a willing participant in the split routing, MOL belatedly recognized there was no way it could convince an impartial fact finder that it did not know about and encourage the split routing. This belated realization was not based upon new evidence but instead was the result of reviewing the evidence that long had been apparent. Indeed, virtually all of the evidence in the record, including MOL email correspondence, transportation orders, shipline delivery orders and trucker's invoices came directly from MOL's files. Thus, this is not a situation where an undiscovered smoking gun from a third party revealed that a party's legal position is not viable; instead the recognition is based upon records in MOL's own files, which presumably would have been discovered by even a cursory review and certainly would have been unearthed by a "thorough investigation."

Having now conceded the indisputable, MOL nonetheless continues to insist that it should be paid for having engaged in split routing, and that Global Link is not entitled to reparations, because MOL does not have a policy of encouraging Shipping Act violations, and only two of its senior personnel were aware of the split routings. These contentions are both legally and factually incorrect. The facts establish that MOL was engaged in a pattern of Shipping Act violations during the course of this Proceeding, as evidenced by its recent Compromise Agreement with the Commission. *See* Compromise Agreement, Supplemental

Proposed Finding of Fact ("SFoF") 151-54, Supplemental Appendix in Support of Counterclaim against MOL ("Supp. App") 577-79.[1] Further, the record reflects that not only did Paul McClintock and Rebecca Yang -- senior MOL employees with primary responsibility for handling the Global Link account -- know about and engineer the split routing but that at least a dozen other MOL employees knew about the ongoing split routing. Moreover, the clear evidence shows that MOL had a long-standing practice of engaging in split routing with at least one of its other large shippers, Nintendo of America ("Nintendo"). Quite simply, under these circumstances, MOL's argument that the knowledge and actions of Paul McClintock and Rebecca Yang are not attributable to it because they were rogue employees is baseless. The overwhelming evidence reveals that MOL willfully and deliberately engaged in a companywide practice of split routing operations that were not limited to Global Link, and that it now improperly seeks to be compensated for its own unlawful conduct.

I. A Showing that MOL was Knowledgeable About Split Routing is a Complete Defense to the Section 10(a)(1) Claim

MOL's assertion that its knowledge of, and participation in, the split routing does not bar it from recovering against Respondents is baseless. MOL relies on *Hohenberg Brothers Company v. Federal Maritime Commission*, 316 F.2d 381 (D.C. Cir. 1964) for the proposition that a violation of Section 10(a)(1) can be supported, even if the carrier was a participant in the violation, when the shipper's competitors were unaware of the scheme because, as stated in

[1] In February of 2011, MOL entered into a Compromise Agreement with the Commission and paid a fine of $1.2 million for having engaged in Shipping Act violations, including providing service not in accordance with the rates, charges, classifications, rules, and practices set forth in its published tariffs. *See* Compromise Agreement, GLL SFoF 152-53, Supp. App. 577-79. Those penalties were imposed for practices that persisted over a period of several years and involved numerous service contracts. *See* CJR. App. at 081, SFoF 154. Peter King, Director of the Commission's Bureau of Enforcement (BOE), further stated that the BOE "became convinced that MOL knew about some of the abuses it uncovered by non-vessel-operating common carriers or shippers." SFoF 155.

Prince Line v. American Paper Export, 55 F.2d 1053, 1055 (2d Cir. 1932), they were entitled to "equality of treatment" under the Shipping Act.

Those cases, however, were decided long before the Shipping Act was amended in 1998 to (a) provide for confidential service contracts, 46 U.S.C. §40502(b)(1); and (b) eliminate, with respect to service contract shipments, the prohibitions against discrimination, preferences and prejudices, *see* 46 U.S.C. §§41104(5),(9) upon which that "equality of treatment" depended. Since those amendments, a Section 10(a)(1) violation cannot be based on hiding a deal between the carrier and a shipper from the shipper's competitors because those competitors no longer have any rights to either know about, or have access to, equivalent deals.

Thus, post-1998, unless the carrier itself is defrauded in some way, there can be no Section 10(a)(1) violation. *See also, United States v. Open Bulk Carriers*, 727 F.2d 1061, 1064 (11th Cir. 1984) (undisputed that fraud or concealment is necessary ingredient of unjust or unfair device); *Ambler v. Bloedel Donovan Lumber Mills*, 68 F.2d 268 (9th Cir. 1933)(no violation of Section 16 where there has been no concealment). Moreover, there is nothing whatsoever in the record of this proceeding indicating that Global Link had any competitors in the relevant trades, or that any "competitor" of Global Link was defrauded by the split routing. In sum, because MOL was, in fact, fully knowledgeable about, and complicit in, the split routing, it cannot claim reparations from Global Link for that same activity.

II. As a Matter of Law the Knowledge and Acts of Paul McClintock and Rebecca Yang Are Attributable to MOL

Rather than simply concede that it was fully aware of, and complicit in, the split routing that began in 2004, MOL now insists that knowledge of the split routing is not attributable to it because only two of its employees knew about the practice. Even if this were true, which as discussed below it demonstrably is not, MOL's argument fails.

The law is clear that a corporation is charged with the knowledge of its agents and employees acting within the scope of their authority. *Western Diversified Services, Inc. v. Hyundai Motor America, Inc.*, 427 F.3d 1269, 1276 (10th Cir. 2005) *see also, Hercules Carriers, Inc. v. Claimant State of Florida*, 768 F.2d 1558, 1574 (11th Cir. 1985) (knowledge of a managing agent, officer, or supervising employee, is attributable to the corporation). Indeed, because a corporation can act only through its officers, agents and employees, it is necessarily chargeable with the composite knowledge of such individuals. *Sawyer v. Mid-Continental Petrol. Corp.*, 236 F.2d 518, 520 (10th Cir. 1956); *citing*, 19 C.J.S., *Corporations*, § 1081, p. 618. Any other approach would allow a corporation to always insulate itself from knowledge and avoid culpability for its actions. *See, e.g., Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365, 1376 (5th Cir. 1983).

The Commission is, if anything, even stricter on this point than the courts. In *Sea-Land Service, Inc. - - Possible Violations of the Shipping Act of 1984*, 29 S.R.R. 492 (ALJ 2002), the ocean carrier, Sea-Land, argued that the knowledge of its employees should not be attributed to it. The Administrative Law Judge rejected this argument:

> Since Sea-Land sales representative and other Sea-Land employees enabled the NVOCCs to access the equipment substitution rule in an unlawful manner, the record establishes that Sea-Land through its agents and employees has permitted shippers to obtain ocean transportation at less than the applicable rates and charges by means of an unfair device or means in violation of Section 10(b)(4).
>
> The Commission has previously addressed the question of a carrier's responsibility for the acts of its agents. In a series of decisions beginning in 1964, the Commission imposed a standard of strict liability on principals for the acts of their agents. *Hellenic Lines Ltd. – Violations of Sections 16(First) and 17*, 7 F.M.C. 673, 676 (1964); *Unapproved FCC. 15 Agreements - - Spanish/Portuguese Trade*, 8 F.M.C. 596, 609 (1965); *Malpractices - - Brazil / United States Trade*, 15 F.M.C. 55, 59 (1971) ("Shipping Act cannot be circumvented through the medium of an agent"); *Pickup and Delivery – Puerto Rico*, 16 FMC 344, 350 (F.M.C. 1973). ("Respondents cannot insulate themselves from the responsibility for the proper performance of the service by attempting to

relieve themselves of accountability for their agents' acts.") As the Commission stated in *Spanish / Portuguese Trade, supra*:

> Sound enforcement of the Shipping Act of necessity demands that those subject to its terms be held to a strict standard of accountability for the acts of agents representing them. As we make clear in *Hellenic Lines Ltd. – Violations of Sections 16(First) and 17,* 7 F.M.C. 673, 676 (1964), we cannot allow a carrier to "immunize itself from the common carrier responsibilities placed upon it by the Act by disassociating itself from any of its agent's activities which are bought into question."

Id. at 576-577 (citations omitted).

The full Commission affirmed the Administrative Law Judge's decision:

> The evidence demonstrates that Sea-Land had the requisite knowledge of the equipment substitution scheme at the sales representative level (e.g., Mr. Favor) and at the export sales manager and regional general manager levels (e.g., Messrs. Wing and Spargo, respectively). In addition, Sea-Land's rate auditing and booking departments contributed, directly and indirectly, to the scheme. Accordingly, the Commission affirms the ALJ's finding that Sea-Land violated Section 10(b)(4) of the Shipping Act of 1984 with respect to 149 shipments and that these violations were knowing and willful. These violations were achieved by unjust and unfair means . . .

Sea-Land Service, Inc. – Possible Violations of the Shipping Act of 1984, 30 S.R.R. 872, 887 (Final Decision, served Feb. 8, 2006).

In this case, as the evidence discussed below clearly demonstrates, MOL had the requisite knowledge of the split routings at the Vice President/General Manager, later Vice President of Sales and Sales Support for the United States level (*e.g.*, Paul McClintock), FoF 5; at the sales representative, subsequently Regional Sales Manager level (*e.g.*, Rebecca Yang), SFoF 155; at the Operations Manager level (*e.g.*, Edward Y. ("Ted") Holt), FoF 40, *see also* MOL Supp. App. 002170 (Holt was Operations Manager and subsequently Manager, East Cost Terminal Services and Contracts); and at the Operations Staff and Supervisory Operations level (*e.g.*, Lacie Bass, Barbara Perry, Jean Flaherty, Kelly Johnson, Lauren Estrada, Jane Martin, Amy Sinclair, Diane Chick and Jeffrey Bumgardner), FoF 60-64, 67,81. Under Commission precedent, therefore, it

is clear that the knowledge and acts of all of these employees and agents of MOL must be attributed to MOL.

A. The Adverse Interest Rule is Inapplicable Because Paul McClintock and Rebecca Yang Were Senior Employees With Broad Delegations of Authority

In the face of this clear-cut authority that corporations are liable for the knowledge and actions of their employees, MOL desperately seeks the protection afforded by the "adverse interest" rule, which applies when a low level employee acts "from purely personal motives, in no way connected with the employer's interests."[2] The adverse interest rule, however, is inapplicable here for a variety of reasons. First, as the Supreme Court held in *Coryell v. Phipps*, 317 U.S. 406, 410 (1943), knowledge will be imputed to the corporation where the employee is an "executive officer, manager or superintendent whose scope of authority included supervision over the phase of the business out of which the loss or injury occurred." This is the case even if the corporate agent or employee is purportedly acting against corporate policy or the corporation's express instructions. *United States v. Sun-Diamond Growers of California*, 964 F. Supp. 486, 491 n. 10 (D.D.C. 1997).

Even if we ignore the overwhelming evidence to the contrary and assume that only two individuals had knowledge of the ongoing split routing, the adverse interest exception simply does not apply. MOL concedes that Paul McClintock and Rebecca Yang were fully complicit in the split routing at issue. *See* MOL Reply Brief at 40 ("McClintock and Yang were collaborating with Respondents.") There is also no legitimate dispute that these were two highly placed employees authorized to act with discretion and judgment on behalf of the company. During 2004-2006, Paul McClintock was the Vice President/General Manager of the Southeastern Region of the United States for MOL. *See* Global Link Proposed Finding of Fact ("FoF") No. 5.

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[2] *Prosser and Keaton on Torts*, Section 70 (5th ed.) 506;

As MOL concedes in its response to Global Link's Proposed Finding of Fact, Mr. McClintock "controlled all MOL sales, customer service, trucking and equipment in this region of the United States." There is also no dispute that up to 100 MOL employees reported to him in this capacity. FoF 5. Mr. McClintock had primary oversight responsibility for Global Link. *See* FoF 6.[3] In addition, Rebecca Yang was a sales representative who subsequently was promoted to Regional Sales Manager. Rebecca Yang Dep. at 56, Supplemental Proposed Finding of Fact ("SFoF") 156, Supp. App. 582. Ms. Yang, who was also fully complicit in the split routing violations at issue, was the MOL's primary contact with Global Link and handled issues with contract negotiations and rates." FoF 7. Quite simply, "[i]t was Rebecca's account." *Id.*

Under these circumstances, where the employees' "scope of authority included supervision" of the business,[4] the adverse interest exception does not apply even if the employees were purportedly acting against corporate policy. *United States v. Sun-Diamond Growers of California*, 964 F. Supp. at 491 n. 10. Indeed, the rationale for such a holding is readily apparent under the facts presented. MOL repeatedly insists that the service contracts were always subject to revision and all that Global Link had to do was ask. MOL Reply Brief at 48. The evidence in the record, however, is plainly to the contrary. MOL admits that when Global Link sought to amend the service contracts so as to eliminate door points and thus put an end to split routing, Paul McClintock was the "primary contact at MOL" with whom it had to negotiate. *See* MOL response to Global Link FoF 118. The record further reflects that, although Global Link first sought such changes in March of 2007, as of August 2007, MOL still refused to make the changes requested by Global Link and to stop relying upon split routings. *See* FoF 116-132; *see also* Chad Rosenberg Declaration at ¶ 48, February 26, 2013 (CJR App. 008) (Mr.

[3] Mr. McClintock subsequently assumed responsibility for MOL sales throughout the entire United States. Paul McClintock Dep. at 32, GLL Supp. App. 584.
[4] *Coryell v. Phipps*, 317 U.S. at 410.

McClintock and Ms. Yang were always reluctant to negotiate new door points for GLL's customers); James Briles Declaration at ¶ 24, 51, February 26, 2013(CJR App. 0016, 0021) (McClintock and Yang reluctant to negotiate new door points and Mr. McClintock was not interested in contracting for "thousands of door points"). Thus on several occasions when Global Link requested rates for additional door points, Ms. Yang advised Global Link to book shipments to the regional points that had already been negotiated in the service contracts, rather than to request additional points." *Id.* at ¶ 25 (CJR App. 0016). Under these circumstances, when the persons with whom Global Link interacted and negotiated its service contracts were senior executives at MOL who had knowledge of and were complicit in the Shipping Act violations at issue, such knowledge is attributable to MOL as matter of law.

B. Paul McClintock and Rebecca Yang Were Not Acting For Personal Gain

MOL's attempts to insulate itself from the acts and knowledge of its senior employees and executives also fail because the evidence clearly establishes that Rebecca Yang and Paul McClintock were not acting for purely personal motives. The "adverse interest" exception is a very narrow one and is limited to instances in which an employee acts "from purely personal motives . . . which is in no way connected with the employer's interests." *Prosser and Keaton on Torts*, Section 70 (5th ed.) 506; *see also*, *Cobalt Multifamily Investors, I, LLC v. Shapiro*, 857 F. Supp. 2d 419, 425 (S.D.N.Y. 2012) (adverse interest exception only applies where individual has "*totally abandoned* the corporation's interest and is acting *entirely* for his own or another's purposes")[5]; *Parmalat v. Bank of America*, 383 F.Supp.2d 587, 598 n. 54 (S.D.N.Y.2005) (adverse interest exception is a narrow one and applies only when the agent has totally abandoned the principal's interests). In *Cobalt*, the court further recognized that the exception only applies where the corporation did not benefit at all from the employees' actions. 857 F.

[5] Emphasis in original.

Supp. 2d at 427. Thus, even if the corporate entity enjoys only short term benefits but suffers long term harm, the exception does not apply. *Id.; see also, Apollo Fuel Oil v. United States*, 195 F.3d 74, 77 (2d Cir. 1999) (in absence of proof that individual personally benefited from wrongful act, strong inference that action was done to benefit the corporation).

Here, the evidence in the record not only reflects that Paul McClintock and Rebecca Yang received no personal benefit from the split routing, it also reflects that their actions were in furtherance of MOL's interests. First, the undisputed testimony shows that neither Paul McClintock nor Rebecca Yang were working on commission, so the amount of sales to Global Link did not affect their compensation.

Q. Was her compensation – Rebecca Yang's, was her compensation related to amount of sales.
A. No, zero.
Q. There was no commission aspect to it
A. No.
Q. How about yours?
A. Zero, none.

McClintock Dep. at 52, SFoF 157, Global Link Supp. App. 589.

Moreover, the primary "evidence" that MOL relies upon in regard to Paul McClintock obtaining a personal benefit from split routing is the testimony of Edward Feitzinger. MOL Reply Brief at 39. Mr. Feitzinger's testimony, however, is clearly speculative, is not based upon any personal knowledge, and does not even suggest that Paul McClintock acted solely for his personal benefit. Indeed, the best that MOL can do in this regard is Mr. Feitzinger's statement that a person, *whose name he does not recall*, once suggested that Global Link had helped make Paul McClintock "a success in MOL." Feitzinger Dep. at 205, 206, MOL App. 1995-95.[6] Even if one assumes that such double hearsay is sufficiently credible to be considered reliable, that

[6] Mr. Feitzinger testified that this information came from "somebody" on the Global Link management team. *Id* at 205. He further elaborated, "I couldn't tell you whether it was Jim or Gary, again, *that was two of the likely suspects* . . . ." Such a hearsay report from an anonymous person does not satisfy any meaningful credibility criteria.

testimony is at least as consistent with McClintock doing well because of the revenue he generated for MOL from the Global Link account as it is with the notion that he was acting solely for his personal benefit and contrary to MOL's interest. *See, e.g., United States v. Automated Medical Laboratories*, 770 F.2d 399, 407 (4th Cir. 1985) (rejecting notion that because employee was ascending the corporate ladder, he must have been acting contrary to the corporation's interest; instead, court recognized that promotion presumably would depend upon advancing the corporation's interests.)

The other evidence that MOL relies upon to establish that Mr. McClintock must have been acting solely for his personal benefit, rather than for the benefit of MOL, is the purported deposition testimony and the Declarations of Jim Briles and Chad Rosenberg that Paul McClintock and Rebecca Yang told them not to discuss split routing "with others at MOL." MOL Reply Brief at 40. The problem with MOL's argument in this regard is that it misrepresents the actual testimony and the sworn statements of Jim Briles and Chad Rosenberg. In fact, Jim Briles testified in his deposition that Paul McClintock told him that conversations in regard to split routing should be limited to "*high level management of Global Link and MOL* and we didn't – our operation group didn't talk about it."[7] Briles Dep. at 133-134 (MOL App. 1226) (emphasis supplied), FoF 13. Similarly, the Declarations of Chad Rosenberg and Jim Briles do not say that split routing should not be discussed with anyone else at MOL. Instead, Mr. Rosenberg's sworn statement reflects that Mr. McClintock and Ms. Yang encouraged Global Link to keep inter-company discussions regard split routing limited to "management-level employees" at Global Link and MOL. Chad Rosenberg Dec. at ¶ 53 (CJR App. 009). The Declaration of Jim Briles also states that discussion regarding split routing should be between

[7] Further, as discussed below, not only senior management but the operations staff were on notice of the ongoing split routing.

management level employees at MOL and Global Link. *Id.* at ¶ 27 (CJR App. 016). None of the evidence cited, therefore, actually supports MOL's position that McClintock and Yang must have been acting solely in their own best interest and adverse to MOL's interest. Indeed, even if they had stated that split routing should not be discussed, it would merely reflect a recognition that MOL was acting in violation of the Shipping Act and should not publicize that fact; it would not establish that their actions were in their own interests as opposed to those of MOL.

C. Paul McClintock and Rebecca Yang Sought to Benefit MOL

In contrast to the dearth of evidence that McClintock and Yang were acting on their own behalf and contrary to the interests of their principal, the evidence that they were acting for the benefit of MOL is compelling. The evidence reflects that MOL received a significant benefit from split routing in the form of reducing its administrative burdens and expenses, FoF 19-20, and avoiding punitive railroad demurrage costs. FoF 21. In addition, MOL benefited by retaining Global Link as one of its largest customers and, more importantly, a unique kind of customer that allowed MOL flexibility to improve vessel utilization which was a key way for MOL to make money. SFoF 159-60, Supp. App. 585-88.

The evidence establishes that MOL preferred that Global Link engage in split routing as it saved MOL from the inconvenience and administrative burden of having to negotiate numerous additional door points rather than simply shipping goods to regional points. FoF 17. Evidence of this was provided not only by Chad Rosenberg and Jim Briles, but also by Paul McClintock and Rebecca Yang. *See* FoF 17-23. In addition, the unrefuted testimony reflects that one of the significant benefits of the Global Link contracts for MOL was that Global Link took on most of the obligations in terms of actually delivering the goods from the MOL container yard to the door point. *See* Paul McClintock Dep. at 63:3-13, September 21, 2011, Exh. C (GLL

App. 17), FoF 19. The willingness of Global Link to handle the inland transportation or delivery of the goods to the door point was a significant benefit to MOL because MOL did not have to do the work involved in handling such moves. *Id.* at 15:19-22 (GLL App. 9), FoF 19-20. MOL no longer had the burden of providing staff to coordinate the door moves. *Id.* at 16:15-17:20 (GLL App. 9), FoF 20; *see also* Rebecca Yang Dep. at 66:14-67, October 4, 2011, Exh. D (GLL App. 40) (significant benefit to MOL in having Global Link use its preferred truckers to deliver goods because it reduced the work load for MOL's operations staff).

Mr. McClintock also testified that during this time period, the railroads were imposing significant penalties for not timely removing containers from the rail yard. FoF 21. Ordinarily, in a door move, MOL assumed such responsibility and had to pay the costs associated with such detention charges. *Id.* By having Global Link take over responsibility for the door moves, however, railroad detention charges were no longer MOL's responsibility. *Id.* (GLL App. 40) (if Global Link uses its preferred trucker, Global Link assumes obligation to pay railroad demurrage charges). Thus, when Global Link began handling the door moves itself, it took the burden off of MOL to make the appointment, to schedule the deliveries, and "to beat" the free time issue at the container yards in question. FoF 22.

Finally, and perhaps most importantly, Global Link provided a substantial benefit to MOL by providing MOL the flexibility to use Global Link's cargo wherever needed to increase MOL's vessel and equipment utilization and enable MOL to achieve the most profitable mix of cargo on any given vessel. As a result, Global Link's value to MOL went way beyond the value of its own cargo from a yield perspective ("It wasn't the highest-paying cargo, so from a yield perspective, it wasn't that – it wasn't that great." McClintock Dep. at 44), SFoF 159-60, Supp. App 586. Global Link enabled MOL to make more money on its other cargo ("It was – it went

beyond just what the dollars and cents were ..." McClintock Dep. at 45, Supp. App. 587. Paul McClintock explained this value of Global Link's cargo in detail in his deposition testimony as follows:

> A Yes, I'd say yes, but because Global Link was a large account, it was a very large account, she -- I mean, she could only follow the direction of the company, basically, as far as managing that customer. It was just -- it was a big –it was a big, complex account and complex relationship, for sure.
>
> Q When you say complex relationship, what do you mean by that?
>
> A Well, Global Link was a little bit -- was different in one regard, and that is they -- as a company, MOL used their business a lot to fill in the gaps as far as vessels. It wasn't the highest-paying cargo, so from a yield perspective, it wasn't that -- it wasn't that great.
>
> But what was positive about the account and the reason the company went after it and wanted it was one of the big benefits of the account was they allowed us to roll their containers out. So if you think about a ship coming in, it's no different than an airline. If it sails at 90 percent, you can never make up that ten percent.
>
> So we had always tried to get certain customers that would allow us, especially during busy season, which some years was all year and other years was just during the summer months, we always tried to get certain customers that would allow us to book slugs of business, 100 containers on a particular ship or 200 or whatever, and then when the ship closes out, all of sudden, there's better freight, better opportunities.
>
> Global Link was one of the accounts that we would then say, sorry, you're not getting a -- you're not getting a pass on the ship, and we would roll their cargo and shut it out and use that cargo to top off a ship, or we might take that cargo and discharge it. It may load in Shanghai, and the ship gets to Tokyo, and all of a sudden, we might have a big booking of business from Japan that pays better, and we would take the Global Link cargo, take it off the ship, park it on the dock, delay it a week, and then maybe pick it up the following week or maybe roll it another week.
>
> That's what I mean complex. It was -- it went beyond just what the dollars and cents were, because we were able to manipulate that cargo and roll it and top off our vessels, which, of course, improved our utilization.
>
> And if you think about a steamship line, the biggest expenses we had were the fixed expenses. I mean, it was just a fixed line of vessels and ships and admin,

> and once you get to a certain point making money, and one of the key ways to make some money is to make sure you fill those ships.
>
> Well, when -- especially when space is tight, typically, customers are making phantom bookings. So Home Depot may call and book 200 containers, and Wal-Mart might call and book 400 containers, and then when the time comes for the ship to sail, you think you're 120 percent of capacity, and when it settles out, you're 80 percent.
>
> So you need the buffer cargo that you can ebb and flow and roll, and most customers won't allow you to do that, they won't put up with that, you know, you can't roll my cargo, so to speak. So we did that with Global Link.

Id. at 43-36, SFoF 159-60, Supp. App 585-88.

D. MOL's Argument That its Employees' Actions Were Adverse to MOL Lack Merit and Are Contrary to Well Established Law

In the face of this evidence, MOL submits that the Commission should nonetheless assume that McClintock and Yang were acting contrary to the interests of MOL and their actions should not be attributable to MOL because: 1) their actions exposed MOL to civil penalties under the Shipping Act; 2) MOL had a policy of not authorizing illegal corporate activity; and 3) MOL would have made more money on the shipments at issue but for split routing. These contentions are meritless and easily addressed.

MOL begins with the assumption that because split routing could result in civil penalties under the Act, the actions of its employees were adverse to MOL and therefore should not be attributed to MOL. *See* MOL Reply Brief at 44. The hole in this logic should immediately be apparent -- particularly to a regulatory body seeking to enforce its statutory authority. Such an approach would render the penalties provided for under the Shipping Act meaningless. Indeed, adoption of such a rule would mean that the adverse interest exception would swallow the rule, thereby negating the principle that corporations are responsible for the acts of their employees. Any corporation caught violating the Shipping Act automatically would be immune from

liability on the grounds that its employees were not acting on behalf of the corporation because their actions could result in the imposition of penalties.[8]

MOL's second argument, that its employees' actions and knowledge are not attributable to it because their actions were contrary to MOL's stated policy, is equally bankrupt. Courts and administrative bodies routinely reject defenses grounded upon the assumption that a company's corporate policy was not to take illegal or tortious actions. Thus, for example, in *Continental Baking Co. v. United States*, 281 F.2d 137, 149 (6th Cir. 1960), the court adopted the already well-established principle that where an agent of a corporation with broad express authority, generally holding a position of some responsibility, takes acts related to his broad authority, the corporation is liable for those acts and must be deemed to have "authorized" the acts. "The foregoing is a simple conclusion inherent in a complex concept. A corporation which employs an agent in a responsible position cannot say that the man was only 'authorized' to act legally . . . . " *Id.* at 149.

Similarly, in *United States v. Armour Co.*, 168 F.2d 342, 343 (3rd Circuit 1948), the court recognized that a corporate employer was responsible for the acts of its assistant managers who had been authorized to act in connection with the sale of its products. This was the case regardless of the fact that the employees repeatedly had been cautioned against taking actions alleged. "The employer does not rid himself of that duty because the extent of the business may preclude his personal supervision, and compel reliance upon subordinates. He must then stand or fall with those whom he selects to act for him." *Id.* at 343-44; *see also, United States v. Peterson*, 188 F.3d 510, 1999 WL 685917 at *12 (6th Cir. 1990) (holding employer responsible

[8] The Commission obviously agrees: "Sound enforcement of the Shipping Act of necessity demands that those subject to its terms be held to a strict standard of accountability for the acts of agents representing them." *Unapproved Sec. 15 Agreements -- Spanish/Portuguese Trade*, 8 F.M.C. 596, 609 (1965); *see also, Apollo Fuel Oil Co. v. United States*, 195 F.3d 74, 76 (2d Cir. 1999) (elementary that a corporation can be guilty of "knowing" or "willful" violation of regulatory statutes through doctrine of respondeat superior).

for actions of employee despite fact that employee was not authorized to file fraudulent cost reports and despite fact that some of the extra money ended up in the employee's own pocket); *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 407 (1985) (fact that employees actions were unlawful and contrary to company policy does not absolve company of responsibility for their acts.); *St. Johnsbury Trucking Co v. United States,* 220 F.2d 393, 398 (1st Cir. 1955) (corporation acts "knowingly" if any agent or servant of corporation has guilty knowledge, in accordance with laws governing civil liability; not enough to absolve corporation from liability that no member of board of directors or high executives knew of wrongful act or that corporation took utmost care to prevent wrongful acts.)

In *United States v. Phelp Dodge Indus. Inc,* 589 F. Supp. 1340 (S.D.N.Y. 1984), the court recognized that these principles apply equally in civil and criminal proceedings. Thus, in civil as well as in criminal proceedings, a corporation which employs an agent in a responsible position cannot say the person was only authorized to act legally. *Id.* at 1359. The court reasoned that the corporation is in the best position to regulate the conduct of its management employees (senior and otherwise) and to not hold the corporation responsible for the acts of its employees "is to immunize the offender who really benefits, and open wide the door for evasions." *Id.*; *see also, In the Matter of Liability of Eastern Broadcasting Corp.*, 1967 WL 13850 (FCC 1967) (fact that the conduct may not have been "ratified, authorized, nor condoned, and, in fact, was severely condemned, and in specific disobedience of company policy," is of no consequence because the corporation is bound by the acts and knowledge of its employees.)

In *Pacific Champion Express Co. Ltd. - Possible Violation of Section 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 1397, 1403 (FMC 2000), the Commission rejected the adverse interest defense and instead held the corporation responsible for the knowledge and acts of its

employees. In doing so, the Commission held that the corporation's attempted reliance upon the adverse interest provision set forth in the Restatement of Agency was unfounded because the carrier had a duty that ran to both its shippers and the general public, and insulating corporations from their actions was contrary to that duty. *Id.* at 1403. Such a conclusion was particularly warranted where the corporation had broadly delegated authority to its agent and then failed to properly monitor the agent's action. *Id.* Thus, the Commission concluded that the respondent's lack of diligent inquiry over a period of years precluded it from asserting that its agent's actions were not its own. *Id.* at 1404. An identical conclusion is warranted here.

E. MOL Cannot Show That the Actions At Issue Were Wholly Inimical to MOL's Interests

Finally, MOL asserts that the actions and knowledge of its employees should not be attributed to it because MOL purportedly would have made more money in handling shipments for Global Link if it had not engaged in split routing. This argument fails for a variety of factual and legal grounds. First, it simply ignores Mr. McClintock's testimony that trucking expenses were merely pass through costs for MOL. *See* Paul McClintock Dep. at 65, 92,; *see also* Dep. at 88, Supp. App 591 ("the truck rate is what it is, so whatever that rate is, that rate is rolled into the equation for the pricing."); 264-65, Supp. App. 596-97 (MOL trucking costs would have been a pass-through); 266-67, Supp. App. 598-99 (split routing "did not cost the company any money"); 291-92, Supp. App. 600-01(regardless of where containers went, Global Link was paying the amount of transportation cost and MOL was being reimbursed for the amount of transportation cost in the full all-end rate). SFoF 161-63.[9] Indeed, when explicitly asked by MOL counsel

[9] MOL emphasizes only half of the equation when noting instances where truckers delivered goods from a port or rail station to a location that was closer than what was reflected on the bill of lading but ignoring the thousands of instances where goods were delivered to a further point than what was reflected on the bill of lading, and Global Link paid the higher trucking charges. *See* Arbitration Panel Award at 9 (GLL App. 00070) (although Global Link did not receive financial benefit from "short stopping," where truckers traveled a shorter distance to a delivery site,

whether MOL was paying more money for the trucking movement than it really should have, the witness disagreed. "I would describe it as different... let me put it a different way. There were points in the contract covered in those situations that -- where the cargo was finally destined that should have been booked to, my opinion, but the same logic that created the rates to Johnson City from the inland from the ramps should be the same logic that's used to create the rate to Braselton." *Id.* at 292, Supp. App.601. When pressed further, Mr. McClintock refused to yield under insistent questioning, refusing to accept counsel's assumption that money was lost by MOL on those shipments. "[T]he same logic that was used to create – the same logic that was used to create the Braselton rate should have been used to create the Johnson City rate if they were—if they both came to the same C[ontainer] Y[ard] and originated at the same C[ontainer] Y[ard]. *Id.* at 294, Supp. App. -. Thus, he concluded that the same net result occurred as if the parties had simply negotiated a new door rate in the contact. "[I]t should be comp -- they should be comparable in net return for MOL, because it's based on the CY rate as the net return. They're not making money on the inland part of it." *Id.* at 295, Supp. App. 603.

MOL's argument also ignores the fact that the transportation industry is a competitive one and thus if, as was the case here, MOL refused to negotiate new door points,[10] but then refused to engage in split routing, Global Link simply would have taken its business elsewhere. *See, e.g.*, Paul McClintock Dep. at 90-91, Supp. App. 592-93, indicating that if rates were higher, Global Link would "have other options," *i.e.*, the goods would "move with another company, another steamship line." Indeed, MOL unwittingly makes this very point in its submission. In

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Global Link paid the trucker an additional amount to compensate the trucker for driving the additional distance to the actual destination.)

[10] *See* Chad Rosenberg Declaration at ¶ 48, February 26, 2013 (CJR App. 008) (Mr. McClintock and Ms. Yang were always reluctant to negotiate new door points for GLL's customers); James Briles Declaration at ¶ 24, 51, February 26, 2013(CJR App. 0016, 0021) (McClintock and Yang reluctant to negotiate new door points and Mr. McClintock was not interested in contracting for "thousands of door points").

the Declaration of Warrin Minck, MOL's internal auditor states that, prior to the time when MOL increased the amount it would pay truckers to transport goods from Monroe, Louisiana to Winnsboro, Louisiana, MOL only handled four (4) of such shipments. Minck Dec. at ¶ 15 (MOL App. 2081). After MOL increased the payment for truckers, however, the volume of business increased dramatically, with MOL handling approximately 600 shipments Minck Exhibit 5, MOL. App. 2112.[11] Obviously prior to that increase in the trucking allowance, Global Link was shipping the cargo through a different steamship line. Thus, far from proving that Paul McClintock was acting solely for his own interest and adverse to the interest of Global Link, the evidence shows that split routing was a tool that MOL used to increase the volume of business it did with Global Link.

Finally, MOL glosses over the fact that no adverse interest can be drawn here because MOL obtained a significant benefit from the actions of Paul McClintock and Rebecca Yang. *See e.g., Cobalt Multifamily Investors, I, LLC*, 857 F. Supp. at 425, (exception only applies where the corporation did not benefit at all from the employees' actions. *Id.* at 427.) Here, there is no legitimate dispute that Global Link was one of MOL's largest customers for a substantial period of time. *See* Yang Tr. at 17, (they were an important customer, "their buying was really huge") SFoF 158, Supp. App 581. There also can be no legitimate dispute, that throughout the time period when MOL shipped cargo for Global Link, MOL had procedures in place to ensure that

[11] Exhibit 5 further undermines whatever limited credibility MOL might still have in regard to its assertion that only Paul McClintock and Rebecca Yang knew about the split routing. A review of Exhibit 5 shows that although MOL purportedly thought that the cargo was destined for Monroe, Louisiana, where the rail ramp is located, it nonetheless continuously paid $200 to truckers even though the goods did not have to be moved by truck (or at most had to move 2 miles) *See* MOL App 2114-2126. Even the most cursory review of its records by MOL would have revealed that it was paying truckers to transport goods when no such transportation was needed. Accordingly, even if one accepts at face value the thoroughly implausible notion that MOL did not notice for a period of many years that it was paying for drayage that was not needed, MOL does not satisfy the "diligent inquiry" standard which must be met in order to measure up to the standards imposed by the Shipping Act. *Pacific Champion Express Co.*, 28 S.R.R at 1403. Moreover, Mr. Minck himself indicated that other individuals at MOL were aware of the trucking cost issues at Monroe. In ¶ 19 of his Declaration, he calls attention to an email from McClintock to Global Link stating that he (*i.e.*, McClintock) ""is taking heat on this one" because MOL's cost of trucking is only $850."" Who would McClintock be "taking heat" from other than his colleagues at MOL?

that its service contracts were profitable. Indeed, MOL had a special team that evaluated revenue generated by service contracts in order to maximize the yield from such contracts. *See* Declaration of Richard Craig at ¶ 2 (MOL App. 2152). Included among the tools that MOL had at its disposal in this regard was "Cost Master," which measured the costs involved in moving a container between a given origin/destination pair in order to ensure that the cargo move was profitable to MOL. *Id.* at ¶ 5 (MOL App. 2153). Although Mr. Craig points to specific instances where individual shipments may not have been as profitable as MOL would like, for example in regard to one instance where goods where moved by truck instead of rail from Fort Worth, Texas, there is no evidence that overall, MOL did not generate significant revenue as a result of its service contracts with Global Link. Indeed, it would defy logic to conclude that MOL continued to do business with a "huge customer," SFoF 158, for year after year if it was losing money on the service contracts.

The law is plain that in order for the adverse interest exception to apply, the actions of an employee must be "*inimical*" of the interest of the corporation. *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 407 (4th Cir. 1985), (emphasis in original). Because no such showing can be made here, the adverse interest exception is simply inapplicable. Instead, the case is analogous to *United States v. A & P Trucking, Co.*, 358 U.S. 121, 126 (1958), where the Supreme Court addressed whether the actions of individuals in transporting explosives and other dangerous articles could be attributed to the partnership. In holding that it could, the Court emphasized that the "the business entity cannot be left free to break the law merely because its owners [and] stockholders . . . do not personally participate in the infraction. The treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment." *See also,*

Apollo Fuel Oil v. United States, 195 F.3d 74, 77 (2d Cir. 1999) (same); *United States v. Armour Co.*, 168 F. 342, 344 (3d Cir. 1948) (to deny the possibility of corporate liability for the acts of employees is to immunize the offender who really benefits and open wide the door for evasion).

III. Numerous MOL Employees Were Aware of the Split Routing

Even if the fact finder somehow were to determine that the acts and knowledge of Paul McClintock and Rebecca Yang are not attributable to MOL, the inevitable conclusion still must be that MOL was aware of the split routing at issue. The evidence is overwhelming that numerous MOL employees were aware of the split routing. Indeed, in addition to Paul McClintock and Rebecca Yang, Laci Bass, Ted Holt, Kevin Hartmann, Barbara Perry, Jean Flaherty, Kelly Johnson, Lauren Estrada, Diane Chick, JoAnn Gault, Lori Kyle, Jane Martin, and Jeffrey Bumgardner of MOL received communications addressing or reflecting spit routing. *See* FoF 48, 67, 81. Thus, at least 14 MOL employees were on notice of split routing during the relevant time period. Such widespread knowledge is attributable to MOL.

A. Ted Holt

The undisputed evidence reflects that Edward Y. ("Ted") Holt III, the Operations Manager in MOL's Norfolk Office, and subsequently the Manager for East Coast Terminal & Service & Contracts for MOL, was fully aware as of at least August of 2005 that Global Link was engaged in a practice whereby its bills of lading were indicating one destination but the cargo was actually being delivered to other locations. *See* FoF 40, GLL App. 128. Mr. Holt's email to Laci Bass also apprised her of the widespread practice. In Ted Holt's email of August 15, 2005, he makes clear that this practice is not an isolated one because he states, in the plural, that they are having trouble getting delivery locations for containers being diverted from Martinsville, Va. *Id.* He further indicates that he is prepared to start billing "*all the back*

diversion charges that we have found out about." *Id.* The undisputed evidence, however, is that neither he nor anyone else at MOL chose to do so. Instead they opted to wait for four more years and then to bring suit alleging that they knew nothing about the practice described in the email and then to assert they were entitled to a recovery of millions of dollars.

In response to this indisputable evidence that Ted Holt and Laci Bass were fully aware of widespread split routing going back to at least 2005, MOL engages in sleight of hand by arguing that, although Paul McClintock testified unequivocally that he shared this very email with Kevin Hartmann, he must not have done so because MOL has not produced such an email in discovery. Global Link addresses this issue below, but even in the unlikely event the email was not provided to and discussed with Kevin Hartmann, there can be no legitimate dispute -- based upon the plain language of the email -- that Ted Holt and Laci Bass were both fully aware of the ongoing split routing. In its Brief, MOL, perhaps wisely, chooses to simply ignore this probative fact. In his Declaration, however, Mr. Holt makes what can generously be called a "disingenuous" attempt to defend his failure to act based upon the information he indisputably had in his possession. Mr. Holt baldly states that he "had no idea" that Global Link was carrying out such a scheme. *Id.* at ¶ 6. MOL App 002171. He also states that if he had only known, he "would have done everything reasonably possible to stop it." *Id.* In fact, however, the email itself describes the very scheme of which he professes ignorance. Indeed, his description, whereby bills of lading are used indicating one destination but the cargo is actually being delivered to other locations, neatly defines split routing. Further as reflected above, he is clearly not talking about an isolated instance. Instead, he is contemplating charging Global Link for "*all the back diversion charges that we have found out about.*" For MOL to even suggest under these

circumstances that Ted Holt and Laci Bass were not on notice of split routing in 2005 insults the Presiding Judge's intelligence.

Based upon their knowledge, however, neither Mr. Holt nor Ms. Bass did anything to stop the ongoing practice whereby Global Link was refusing to tell MOL where containers were being delivered. Indeed, even if we accept MOL's and Kevin Hartmann's bland assurances that Paul McClintock told him nothing, it fails to explain why Mr. Holt and Ms. Bass took no further action. Mr. Holt clearly was in a senior enough position that he was prepared to begin billing Global Link for diversion charges, but he failed to do so. Whether this decision was his own or at the instruction of MOL's General Counsel is largely irrelevant. Presented with knowledge of widespread split routing in 2005, rather than do "everything reasonably possible to stop it," MOL chose to do nothing.

B. Laci Bass

In light of the above correspondence, it is ironic that MOL relies upon the fact that Laci Bass, one of MOL's employees in its operations department, supposedly did not approve of split routing as evidence that Paul McClintock and Rebecca Yang were rogue employees acting adverse to MOL's. MOL Brief at 30. In fact, however, the evidence discussed above shows that, when apprised of the ongoing widespread split routing, she did nothing about it. This is not surprising because the contemporaneous documents show that Ms. Bass participated in a phone call whereby MOL, Global Link and a trucker (Evans Delivery) agreed to accommodate each other's concerns in regard to split routings "on a case-by-case basis." FoF 39. In that correspondence there is a discussion as to how the parties will apportion the fees associated with the split routing. *Id.* In addition, Ms. Bass received numerous delivery orders reflecting split

routings, *see* FoF 74, 83,[12] and she herself later wrote to Paul McClintock and Rebecca Yang, and cc'ed Ted Holt, in regard to a split routing whereby Global Link cargo that was booked for Martinsville, Virginia was actually going to Hancock, Maryland. FoF 88. Thus, far from proving that McClintock and Yang were acting outside of the boundaries of expected behavior at MOL, the evidence shows that Laci Bass, along with many other MOL employees, was fully aware of the ongoing split routing.

C. Shipline Delivery Orders Establish that Numerous Other MOL Employees Were Aware of Split Routing

The evidence submitted in Global Link's Appendix establishes beyond legitimate dispute that MOL received hundreds of Shipline Delivery Orders from Global Link reflecting that goods were being transported to locations different than those in the MOL bills of lading under which the goods moved. *See* FoF 66-87. There is also no dispute that more than ten MOL Operations level and supervisory Operations level employees received such communications. FoF 60, 64, 67, 74, 83, 85, 88. (These employees included Barbara Perry, Jean Flaherty, Kelly Johnson, Lauren Estrada, Laci Bass, Jane Martin, Amy Sinclair, Diane Chick, Rebecca Yang and Jeffrey Bumgardner.)

In response, MOL states that receipt of hundreds of documents reflecting cargo going to destinations different than those reflected on MOL's bills of lading did not constitute notice of split routing, and/or that the employees did understand the significance of the documents. Again, MOL's arguments fail as matter of fact and law.

First, the law is clear that a party need only be on notice that it has a potential claim in order to trigger the statute of limitations. The knowledge necessary to constitute such notice need not be conclusive or absolute; it merely consists of sufficient facts to prompt a reasonable

[12] There were four separate delivery orders reflecting split routing in that particular email.

person to inquire and seek advice preliminary to deciding if there is a basis for filing an action. *Skwira v. United States*, 344 F.3d 64, 77 (1st Cir. 2003). Thus, the fact that the plaintiff may not know the extent or scope of wrongdoing is irrelevant for determining whether the statute of limitations has run "because the limitation period will begin to run even if plaintiff does not know all of the facts necessary to assert a claim." *Williams v. P.O. Baird*, 1997 WL 438495 at *1, n. 2; *see also, Fitzgerald v. Seamans Jr.*, 384 F. Supp. 688, 693 (D.D.C. 1974) (plaintiff cannot toll a statute of limitations merely by alleging that the depth and scope of the actions at issue remained hidden); *United States v. Bill Harbert Int'l Construction Inc.*, 505 F. Supp. 2d 1, 7 (D.D.C. 2007) ("courts have consistently found that a limitations period begins to run under the 'should have known' standard at the point in time that [the plaintiff] 'discovers, or by reasonable diligence, could have discovered, the basis of the lawsuit.'") A plaintiff cannot defeat the due diligence requirement "by burying its head in the sand." *Skwira*, 344 F.3d at 77, *quoting Diaz v. United States*, 165 F.3d 1337, 1339 (11th Cir. 1999). Once a duty to inquire is established, the plaintiff is charged with the knowledge of what it would have uncovered through a reasonably diligent investigation. *McIntyre*, 367 F.3d at 38, 52 (1st Cir. 2004); *see also, Dayco Corp v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975) ("any fact that should excite [the plaintiff's]suspicion is the same as actual knowledge of his entire claim."); *United States v. Bill Harbert Int'l Construction Inc.*, 505 F. Supp.2d at 8 (D.D.C. 2007) (lack of knowledge of specific pattern of fraudulent activity does not toll the statute of limitations); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 403 (5th Cir. 1998) (tolling may expire and statute of limitations begins to run before plaintiff subjectively learns details of evidence by which to establish case of action); *Fisher v. Samuels*, 691 F.Supp. 63, 72 (statute not tolled where plaintiff has sufficient knowledge to pique suspicions); *Vessels v. City*

of Philadelphia, 2011 WL 4018137 (E.D. Pa. 2011) at *7 (plaintiff need not know all of the facts necessary to assert a claim before statute of limitations begins to run); *Cole v. Kelly*, 438 F.Supp. 129, 139 (C.D. Cal. 1977) (knowledge of evidence or details of case not necessary to stop tolling). Thus, MOL's argument that notice to its employees of split routing on hundreds of occasions is insufficient to put it on notice of such potential claims fails as a matter of law.

MOL's argument that its employees were unaware of the significance of the shipline delivery orders also fails as a matter of fact. Indeed, MOL's argument in this regard is a classic example of a party wanting to have its cake and eat it, too. The thrust of MOL's Complaint is that Global Link fraudulently deceived ocean carriers by submitting shipline delivery orders reflecting false destinations. *See, e.g.*, MOL Reply Brief at 28-29, and MOL Proposed Finding of Fact 56 (fraudulent schemed required use of different shipline and truckline delivery orders). In light of this, MOL cannot now argue with a straight face that its receipt of such documents showing the actual location where the cargo was being delivered does not constitute notice of split routing. If the shipline delivery orders are of such little import that they do not provide notice to MOL of split routing, they cannot provide the foundation for a fraud claim.

Finally, whatever limited plausibility MOL's argument might have that the shipline delivery orders did not provide notice of split routing is belied by contemporaneous emails from MOL employees. On December 1, 2005, three and a half years before this Complaint was filed, one of MOL's employees, Diane Chick, wrote to her supervisor, Jane Martin, noting that the "b/ls [bills of lading] are showing West Monroe DOOR moves, but the delivery order I have for b/l #481637003 reads Winnsboro, LA, which is at least 30 miles south of West Monroe. We can only deliver to where the b/l reads unless the customer wants to pay the additional drayage."

FoF 60. This provides definitive proof that MOL employees, including its supervisory operations personnel, were fully informed as to the ongoing split routing.

The fact that another MOL supervisor instructed at least five different employees to ignore the fact that that "you are not supposed to do this," and just to cut a "TPO [Transportation Order]" for a fraudulent destination, only highlights the fact that MOL's Operations staff were fully aware of, and complicit with the split routing practices at issue. FoF 61-64.

D. Trucker's Invoices Reflect MOL Knowledge of Split Routing

MOL's argument that the fact finder should ignore MOL's receipt of numerous truckers' invoices showing split routings is equally spurious. MOL first contends that it is not sure it actually received such invoices because these may not actually be invoices. Setting aside the fact that each of the documents themselves state "invoice" on the top, the undisputed evidence shows that the trucker in question produced such invoices pursuant to a document request and that he testified under oath that he billed MOL for such invoices. *See* Denton Dep. at 153-54, SFoF 168 (GLL Supp. App. 607-08). For MOL to contend otherwise is specious.

MOL next trots out the argument that it either did not look at the invoices, or that, if it did, its policy is not to check to see whether it is being billed for delivery to the location where goods are supposed to be delivered. *See* Camacho Dep. at ¶ 3, MOL App. 002151. Again, such an argument is incredible, given MOL's contention that Global Link's use of "preferred truckers" and their issuance of fraudulent invoices was a central part of the split routing scheme at issue. *See* MOL Brief at 29, and MOL Proposed Finding of Fact 51. The plain truth is that the trucker's invoices establish again that MOL was on notice of to the ongoing split routing. Clearly, in this regard MOL does not satisfy the "diligent inquiry" standard that must be met in

order to measure up to the standards imposed by the Shipping Act. *Pacific Champion Express Co.*, 28 S.R.R. at 1403.[13]

E. Nintendo's Split Routing Scheme Shows that MOL Had a Company Wide Policy of Promoting Split Routing

Perhaps nowhere in MOL's voluminous pleadings is its lack of candor and intent to mislead more evident than in its submission concerning to Nintendo and the fact that MOL engaged in split routing with Nintendo for an extended period of time. Indeed, it is only by closely parsing the language of MOL's Declarations that it becomes clear what MOL and Nintendo were doing during the relevant time period.

MOL's initial assertion is that the fact finder should not look behind the curtain in regards to Nintendo because to do so could not have any relevance in determining whether MOL was aware of and complicit in split routing. Such an argument is ludicrous. If, as the facts clearly establish, MOL had a practice in place of willingly engaging in split routing with shippers other than Global Link, it cannot plausibly argue that it did not knowingly engage in split routing on Global Link shipments and that knowledge of the practices should not be attributed MOL. To the extent the previous Presiding Judge suggested as much, he clearly was in error.

Paul McClintock testified that the primary function of three MOL employees was to deliver goods to destinations different than those reflected in the Nintendo service contract and different than the those reflected in MOL's bills of lading. FoF 138. It was "*standard operating procedure*" for MOL to engage in split routing on behalf of Nintendo. *Id.* He also testified that,

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[13] MOL also asserts that the fact that there are relatively few trucker invoices in the record showing delivery to the actual location proves that Spirit is the only trucker who provided notice to MOL where goods were actually being delivered. No such assumption can be made. The Spirit invoices were not produced in discovery by MOL, despite the fact that they evidence MOL's knowledge of split routing. (Indeed, MOL apparently takes the position that it has no way of knowing what invoices it received.) *See* Camacho Dec. at Para 4, MOL App 2151. The Spirit invoices were produced in response to a subpoena issued to Spirit. Presumably if such records were sought from other truckers, they would also show MOL having received notice of the actual location where goods were being delivered.

despite that fact, MOL did not seek to re-rate the shipments or seek diversion fees from Nintendo. FoF 139.

While, MOL understandably seeks to discredit his testimony in this regard, the evidence MOL relies upon to do so actually confirms that Nintendo and MOL had a long-standing practice of engaging in split routing dating back to at least 2004. Indeed, a close review of the Declaration of Solange Young, Global Link App. 00488, FoF 143, which MOL cites in support of its position, confirms that MOL was fully aware of the ongoing split routing. Ms. Young admits that although MOL issued and paid for transportation orders to North Bend, Washington, the weekly container delivery schedules that MOL received from Nintendo show actual deliveries to different locations. *See* paragraph 3, Global Link App. 00488 (container delivery schedules "*show locations of [Nintendo] warehouses that were not the locations in [MOL's] documents.*")[14] The sample delivery schedule attached to her Declaration confirms that fact. *See* Global Link App. at 00490-91.[15] The sample delivery schedule shows that, out of 56 containers handled that week by MOL for Nintendo, only 8 were delivered to North Bend. The remaining 48 were split routed to either Redmond, or Yakima, Washington. *Id.* [16]

MOL's summary of the Nintendo shipment documentation -- which was only produced after the then presiding judge ordered it -- further states, that "according to [Nintendo]," 82% (98 of 119) of the containers in those shipments were diverted from the delivery site listed on MOL's Transportation Order and bill of lading. *See* FoF 144.[17] Thus, out of 119 containers delivered on behalf of Nintendo, 34 were delivered to contractors at unspecified locations, and another 59 out

[14] *I.e.*, the locations on the bill of lading and on the transportation orders.

[15] MOL also provided a copy of Ms. Young's Declaration and the container delivery schedule in its Appendix, but did not include the second page of the sample container delivery schedule which shows that an additional 16 containers were split routed to Redmond, Washington with only one container being delivered to its true destination, North Bend. See MOL App. at 002064.

[16] According to Mapquest, Yakima Washington is 115 miles away from North Bend

[17] *See* April 12, 2012 Commission Memorandum and Order on Pending Motions Docket No. 09-01 (151) at 4. The Order also directed MOL to include copies of shipping documents from representative diverted Nintendo shipments.

of 119 were diverted to Redmond, Washington, instead of to North Bend. FoF 145.[18] None of these locations was in the Nintendo service contract with MOL.

A close examination of the Declaration of Lyn Simms, *see* MOL App. 002065, further confirms that MOL was aware of the ongoing split routing. Mr. Symms admits that, at the time MOL booked shipments on behalf of Nintendo, Nintendo would not yet know the ultimate destination to which the goods were to be delivered. Symms Dec. at ¶ 4, MOL App 002066. *Thus, although the bills of lading were primarily consigned to North Bend, the decision as to where the goods would actually be delivered was left to Nintendo's discretion. Id.* at ¶ 4. Mr. Symms further admits that MOL's service contract was not amended to allow this practice until 2008. *Id.* The split routing with Nintendo apparently dated back to 2004, when Mr. Symms assumed the position of Coordinator in the Operations Department in MOL's Seattle office. *Id.* at ¶ 2.

Despite this long-standing practice, MOL never charged Nintendo diversion fees or sought to re-rate the ocean freight rates to the new destinations. *See* Young Dec. at ¶ 5; GLL App 472; FoF 145.

Thus, the sworn statements of MOL's own witnesses, and the sample container delivery schedules, demonstrate that MOL had a policy and procedure in place since at least 2004 to permit Nintendo to engage in split routing. Under the circumstances, for MOL to contend that with the exception of two people, the company was wholly ignorant of the practice of split routing and never would have condoned it if it had known about it, is baseless. The plain truth is

[18] Incredibly, in its filing with the Commission, MOL further admitted that, even if it had known that the goods were being diverted to new destinations, it "likely" would not have re-rated the ocean freight charges. FoF145.

that MOL had a policy, at a minimum, of condoning, and often of encouraging, split routing. To argue to the contrary is simply to ignore the evidence.[19]

F. Knowledge of Kevin Hartmann

As reflected in the discussion above in regard to Ted Holt, the issue of whether Kevin Hartmann, MOL's General Counsel, personally was told of split routing should not matter because numerous other senior and other employees were fully aware of and encouraged the split routing practice at issue. Because the evidence of his knowledge is convincing, however, the fact finder should conclude that Mr. Hartmann was fully aware of the ongoing split routing and, like other senior management at MOL, chose to allow the practice to continue so as not to harm MOL's business relationship with Global Link and to continue to take advantages Global Link's volumes brought to MOL.

In order to believe that MOL's General Counsel did not know about the ongoing split routing, one must assume that Paul McClintock perjured himself in testifying that he was positive that the Ted Holt email discussing the widespread split routing by Global Link was forwarded to, reviewed and discussed by Mr. Hartmann. FoF 43, 44, 48-53. MOL's position also requires the implausible assumption that Ted Holt would simply have ignored the ongoing split routing and never bothered to follow up in regard to the matter with Mr. Hartmann. FoF 49 (*"There's no way [Ted Holt] would have allowed that to happen. I am absolutely sure of that."*)

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[19] In its discussion of the Nintendo split routing, MOL unwittingly undermines its argument that McClintock and Yang's actions and knowledge should not be attributed to MOL because they are rogue employees who acted on their own contrary to MOL's normal procedures. MOL acknowledges, indeed, it emphasizes, that McClintock and Yang were not personally involved in the Nintendo split routing. *See* Brief at 55. Thus, MOL's split routing on behalf of Nintendo, one of MOL's largest customers, which went on for a four year period in a different region of the country, could not have been engineered by McClintock and Yang. Quite simply, the split routing in regard to Global Link cannot be dismissed as the isolated actions of two senior executives acting contrary to company policy.

To counter this, MOL offers the sworn statement of Kevin Hartmann and the fact that MOL purportedly looked for email records of such communications but never found them. In weighing such evidence, one must consider MOL's and Mr. Hartmann's credibility. In this regard, it is noteworthy that MOL claims Mr. Hartmann conducted a "thorough investigation" in 2008 and failed to find any evidence that MOL knew of or encouraged split routing. MOL FoF 33. Now, five years later, MOL concedes that, in fact its senior personnel with primary responsibility for the Global Link account colluded with Global Link to conduct split routing and vigorously fought to maintain the practice after Global Link's current management sought to end it. This belated admission was not the result of discovery obtained from third parties, but instead was an unavoidable conclusion based upon documents obtained from MOL's own files. Thus, the statement that MOL conducted a thorough investigation into the practice of split routing in 2008 is demonstrably false.

Further in determining how much weight to give the fact that MOL failed to find emails from Kevin Hartmann discussing split routing, the fact finder should also consider MOL's failure to produce documents in response to discovery requests. Recognizing that MOL's knowledge of split routing was of fundamental significance in this case, the Respondents' served discovery on MOL seeking information tending to establish MOL's knowledge of split routing—not only by Global Link, but by other MOL shippers as well. Specifically, Global Link sought all information reflecting MOL's knowledge of split routing. FoF 133. Although MOL purported to produce responsive documents, it failed to produce any documents concerning the split routing with Nintendo. FoF 134. Ultimately, in response to the then presiding judge's order, MOL produced the limited documents cited above establishing beyond cavil that MOL had a long-standing practice of delivering Nintendo goods to locations different than those in MOL's bills

of lading or in transportation orders.[20] Under these circumstances, where MOL failed to produce documents clearly responsive to Global Link's discovery requests, MOL is not entitled to any presumption that records not produced in discovery do not exist.

Finally, in determining MOL's credibility in this regard, the fact finder should consider MOL's continued history of making false representations in legal proceedings. This Complaint was filed in May of 2009, alleging that Global Link engaged in split routing using its preferred truckers. In 2012, MOL filed suit against numerous truckers, some of whom were the Global Link preferred truckers referenced in MOL's Complaint alleging that they participated in unlawful split routing schemes. FoF 146. In so doing, MOL asserted that it did not learn of the allegedly fraudulent trucking practices until February of 2011, almost two years after the Complaint in this proceeding was filed with the Commission. FoF 147. This assertion cannot be true. Under these circumstances, where MOL has exhibited a repeated and brazen history of making knowingly false statements, there should be no presumption that its failure to produce responsive documents means that they do not exist.

IV. The Decision in the Seamaster Case is Inapposite and Does Not Support MOL's Position

In the face of overwhelming authority that a corporation is responsible for the acts of its employees -- some of which authority MOL itself relies upon to establish liability against the Rosenberg and Olympus Respondents -- MOL asserts that an adverse interest finding should be made in the cases of Paul McClintock and Rebecca Yang, thereby insulating MOL from the consequences of its own wrongful conduct. MOL relies upon a district court's decision in *Mitsui*

[20] Given the pervasive nature of its split routing practices, Global Link assumes that MOL documents not produced in discovery would establish that MOL also engaged in split routing with other shippers during the relevant time period.

O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc., 2013 U.S. Dist. LEXIS 40466 (N.D.Cal. 2013) as justifying such a result. MOL's reliance is misplaced.

Seamaster involved MOL's allegations of Racketeer Influenced and Corrupt Organization ("RICO") and Shipping Act violations for claims arising out of actions taken in China, and, separately, for split routing similar to that alleged in this proceeding in the United States. The court found that MOL had stated a claim for the actions taken in China, but had not proved a Shipping Act violation in regard to the split routing in the United States. *Id.* at *15. In doing so, the district court judge ruled that the adverse interest exception should apply to the Chinese shipments because the MOL China employee had totally abandoned the interest of MOL in promoting the scheme at issue, which allowed for the siphoning of money from MOL to a third party trucker. *Id.* at *80. There was also testimony that the MOL employee had a financial interest in that trucker. *Id.* at * 35.

The facts here are readily distinguishable from those presented in *Seamaster* because there, unlike here, there was no evidence presented that other MOL employees were aware of the unlawful activities. *Id.* at *80. Further, unlike the evidence now before the Commission, there was no evidence in *Seamaster* that MOL benefited from the wrongful acts at issue. Indeed, the court there found that MOL received no benefit from the wrongful act because the shipper had no viable alternative to MOL as a carrier. "Thus, the Shenzen door arrangement caused MOL to give away a valuable service- space protection – for free. It also allowed Defendant to avoid paying the higher origin receiving charges that MOL assessed at Hong Kong ports." *Id.* at *80-81. In sharp contrast in this Proceeding, there is compelling evidence that MOL received a substantial benefit from the split routing in the form of reduced administrative burdens and costs, and reduced exposure to punitive demurrage charges, FoF 17-23, SFoF 159-60, as well as the

volumes of Global Link shipments. SFoF 158. Further the evidence reflects that the split routing was necessary to make MOL competitive on rates. *See* SFoF 165-66. Finally, here there is no evidence whatsoever that McClintock gained any personal benefit from the wrongful acts at issue, as opposed to the evidence in *Seamaster* suggesting that the MOL employee siphoned money to a trucker in which he may have had a financial interest. *Id.* at 35.

To the extent the *Seamaster* court held that it is irrelevant whether or not other MOL personnel were aware of and participated in the arrangement because all of their actions would then have been adverse to MOL, the Court's holding is simply wrong. *Id.* at * 83-84. Such a holding turns on its head the well-established precedent that a corporation is bound by the acts of its employees. If the *Seamaster* logic were adopted, corporations would become a haven for scofflaws and ne'er do wells of every stripe as corporations could uniformly avoid liability for any of their criminal or tortious acts simply by arguing that its employees, no matter how senior and no matter how broadly delegated their authority, were not acting on behalf of the corporate entity. [21]

V. MOL's Claim is Time Barred

MOL contends that the statute of limitations on its claims have not run because a claim does not accrue based upon mere hunches, hints or rumors. It then analogizes this case to *Inlet Fish Producers, Inc. v. Sea Land Services, Inc.*, 29 S.R.R. 306 (FMC 2001), where the Commission concluded that finding the evidence supporting the complainants claim would have been like finding a needle in a haystack. Such an analogy is inapt.

[21] The California court also recognized that MOL could recover despite the fact that a "reasonable investigation" would have revealed the wrongful acts at issue *Id.* at * 84. While that arguably is the case under California law, it is contrary to Commission authority which holds that "diligent inquiry" is required in order to comply with Shipping Act requirements. *Pacific Champion Express Co.*, 28 S.R.R. at 1403.

Here, MOL now concedes that two of its senior employees were aware of the split routing dating back to 2004. However, even if one disregards that fact, MOL's claim is still time barred. Ted Holt's email of August 2005 to Paul McClintock and Laci Bass by itself disproves MOL's contention that "MOL never received sufficient information to enable it know of, or even suspect or investigate, the scope GLL's split routing practice," MOL Brief at 52. From that email alone it is indisputable that MOL employees were fully aware that split routing was occurring, *i.e.*, " bills of lading were indicating one destination but the cargo was actually being delivered to other locations," that the practice was widespread, and that they should start billing for "all the back diversion charges that we have found out about." *Id.* Thus, this was not a "storm warning," as MOL contends, it is actual knowledge of an ongoing hurricane that is pulling tiles off the roof.

In the face of this, MOL nonetheless blithely argues, *see* MOL Brief at 63, that so called storm warnings only triggers a duty to investigate, and that the limitation period begin to run "only when a reasonably diligent investigation would have discovered the fraud." Here, the facts are plain. MOL was on notice of the fraud but instead of investigating it, it chose to hide its head in the sand.

VI. MOL Is Not Entitled to a Windfall Due to Its Own Shipping Act Violations

The overwhelming evidence establishes that, rather than negotiate individual door points in its service contracts with Global Link, MOL chose to book shipments to regional points that had already been negotiated in the service contracts and to have Global Link take responsibility for trucking goods to their actual destinations. As discussed above, this benefited MOL by permitting it to avoid significant administrative burdens and expenses involved in handling the inland transportation or delivery of the goods to the door point. By having Global Link personnel handle and coordinate such moves, MOL avoided the burden of hiring staff to

coordinate such door moves. In addition, it insulated MOL from punitive demurrage charges that railroads imposed for not timely removing containers from their yards.

Having deliberately violated the Shipping Act in order to gain such an advantage, MOL has now decided, years later, to go back and seek to recover not only for "*all the back diversion charges*" that they have known about all along, but also to seek to recover the inflated charges associated with shipping to locations where they did not have competitive rates. Such a practice should not be condoned.[22]

Under these circumstances, where the evidence shows that: 1) MOL has a history of Shipping Action violations: 2) Paul McClintock and Rebecca Yang were given broad authority to handle MOL's business with Global Link; 3) where McClintock and Yang gained no personal benefit from the split routing; 4) where numerous other MOL employees were on notice of the split routing; and 5) where MOL profited as result of that business, the knowledge and acts of MOL in encouraging and condoning split routing must be attributed to MOL. Any other result would encourage carriers to collude in violating the Shipping Act and then to seek a windfall as a result of their own deceptive practices.

VII. Global Link is Entitled to Reparations for MOL's Violations of the Shipping Act

MOL mischaracterizes Global Link's Counterclaim as being simply a claim for damages as a result of MOL's filing of the Complaint in this case. In fact, Global Link asserts that MOL has violated several discrete sections of the Act, thereby causing Global Link to suffer actual damages for which reparations are in order. In the first place, Global Link alleges that MOL has

[22] Nor can MOL rely on the filed rate doctrine to collect these charges. As the evidence conclusively demonstrates, MOL was fully cognizant of, and complicit in, the split routing practices. Its invoices to Global Link for the charges to the destinations shown on MOL's bills of lading are reflections of this agreement. Pursuant to 46 U.S C. §41109(d), therefore, Global Link cannot be ordered to pay the difference between those agreed rates and the amounts set forth in the MOL service contracts.

violated 46 U.S.C §41104(1), which prohibits a carrier such as MOL from allowing "a person to obtain transportation for property at less than the rates or charges established by the carrier in its ... service contract by means of ... [an] unfair devise or means." This section is, of course, directly related to 46 U.S.C §41102(a), which establishes a like prohibition against shippers such as Global Link and is the section relied upon by MOL in seeking reparations here. Given MOL's knowledge of, and complicity in, the split routing practices that are at the core of this case, any violation by Global Link of this section will inevitably mean that MOL has violated 46 U.S.C §41104(1). Any damages collected by MOL from Global Link under 46 U.S.C §41102(a), therefore would constitute "actual damages" for MOL's violation of 46 U.S.C §41104(1).

Secondly, Global Link asserts that MOL is in violation of 46 U.S.C. §41104(2)(A), which prohibits a common carrier from charging a shipper rates that are not contained in a service contract. The evidence presented by Global Link in the damages portion of this proceeding will demonstrate that MOL overcharged Global Link on a series of shipments under the service contracts at issue and that Global Link is entitled to a refund of those overcharges as reparations.

Global Link also asserts that MOL has violated 46 U.S.C. §41102(c), which prohibits common carriers from engaging in unjust and unreasonable practices. As noted earlier in this Brief, MOL refused to file rates in its service contracts for many of the points that Global Link served through split routing, *supra* at 9-10, 13. The Commission has previously held that the failure of a carrier to file a rate is an unjust and unreasonable practice. *Y. Higa Enterprises, Ltd. v. Pacific Far East Line, Inc.*, 7 F.M.C. 62, 64 (1962); *see also Total Fitness Equipment, Inc. v. Worldlink Logistics, Inc., 28 S.R.R. 534, 541 (1998)*(failure to have a suitable rate on file constitutes an unreasonable discrimination). Moreover, the Commission has defined a "just and reasonable practice" as one that is "otherwise lawful but not excessive and which is fit and

appropriate to the end in view." *Investigation of Free Time Practices - - Port of San Diego*, 9 F.M.C. 525, 547 (1966). A practice that is not otherwise lawful and not fit and appropriate to the end in view is, therefore, an unjust and unreasonable practice in violation of Section 10(d)(1) of the Shipping Act, 46 U.S.C. § 41102(c) "Congress . . . [i]n adopting such broad and undefined terms as unfair and unjust and unreasonable . . . granted the Commission wide discretion in determining whether the circumstances in any given case violate the statutes." *Investigation of Practices of Stockton Elevators*, 8 F.M.C. 187, 200 (1964). The Commission and courts have found practices to be unreasonable in a variety of contexts. *See, e.g., Rates, Hong Kong – United States, Trade*, 11 F.M.C. 168, 176 (1967) (unreasonable practice to make a facility or service available only to persons based upon their identity as shippers or consignees of Chinese descent); *Pick Up and Delivery – Puerto Rico*, 16 F.M.C. 344, 349 (1973) (unreasonable practice to allow shippers and consignees to designate truckers to furnish pick-up and delivery services which carriers are obligated under their tariffs to perform and for which they are responsible); *Total Fitness Equipment Inc. d/b/a Professional Gym v. Worldlink Logistics Inc.*, 28 S.R.R. 534, 540 (1998) (unreasonable practice to double bill a shipper for transportation); and *Volkswagenwerk A.G. v. FMC*, 390 U.S. 261, 282 (1968) (unreasonable practice to assess port users fees that are not reasonably related to benefits received).

Here, it is clear that MOL's actions constitute unreasonable practices. *First*, the practices themselves are unlawful in violation of Sections 10(b)(1) and (2)(A) of the Shipping Act, 46 U.S.C. §§ 41104(1) and (2)(A), for the same reasons that MOL asserts that Global Link has violated Section 10(a)(1) of the Shipping Act; 46 U.S.C. § 41103(1). *Second*, MOL's complicity in and encouragement of Global Link's split routing practices so that MOL could avoid having to negotiate multiple door points in service contracts and the administrative burden of arranging for

inland transportation, as well as maintain the Global Link volumes of shipments was not "fit and appropriate to the end in view." *Investigation of Free Time Practices - - Port of San Diego, supra*, 9 F.M.C. at 547. Finally, MOL's attempt to collect reparations from Global Link as a result of the split routing practices in which MOL was complicit, and benefited from, is manifestly unreasonable by any standard. To engage in unlawful acts, reap the benefits from those unlawful acts, and then turn around and sue Global Link is neither just nor proper, nor ordinary or usual as reasonable practices are defined by the Commission. *Id.* It is, therefore clear, that MOL has violated - - and continues to violate - - Section 10(d)(1) of the Shipping Act. Global Link has suffered actual damages as a result and is entitled to reparations therefor.

MOL nonetheless argues that Section 10(d)(1) is inapplicable because the violation here does not relate to receiving, handling, storing or delivering property. Such a contention is baseless. As discussed above, Global Link's Complaint asserts that MOL entered into an agreement with Global Link whereby it charged rates to locations different than what was provided in MOL's tariff. It then sought years later to renege on that agreement and re-rate the charges and charge Global Link diversion charges for moving the cargo to the agreed upon locations. All of the charges at issue directly relate to the receiving, handling, storage or delivery of property. On numerous occasions, the Commission has considered whether a carrier's billing practices in regard to shipments are just and reasonable. *See, e.g., Save On Shipping, Inc. v. Puerto Rico Maritime Shipping Authority*, 27 S.R.R. 151 (1995), *aff'd, Puerto Rico Maritime Shipping Authority v. Federal Maritime Commission*, 75 F.3d 63 (1st Cir. 1996); *Aluminum Products of Puerto Rico, Inc. v. Trans-Caribbean Motor Transport, Inc.*, 5 FMRS 1, Appendix at X (1956).[23] For MOL to suggest otherwise is specious.

[23] The fact that MOL has filed suit in support of its unjust collection practices does not take such practices outside of the realm of Section 10(d)(1).

MOL cites two cases in support of its position, neither of which is relevant. In *Burlington Northern Railroad Company v. M.C. Terminals,* 26 S.R.R. 682, 694 (ALJ 1992), the Administrative Law Judge recognized that the Commission lacked jurisdiction over a marine terminal operator where the actions at issue were outside of the scope of the Shipping Act. Clearly, MOL cannot show that its handling of Global Link's cargo at issue and its billing practices in that regard are outside of the scope of Shipping Act. Thus, its reliance upon the case is misplaced.

MOL's reliance upon *J.M. Altieri v. The Puerto Rico Ports Authority*, 7 F.M.C. 416, 419 (ALJ 1962) is equally misguided. There, the Administrative Law Judge was presented with an offset claim where the shipping aspects of the transaction had already been completed. Under those circumstances, he concluded that the question presented did not involve issues so peculiar to shipping matters that Commission intervention was required. *Id.* at 420.[24] If MOL is suggesting that the questions presented here in regard to split routing and a carrier's ability to agree to one rate and then seek to charge another is not with the Commission's jurisdiction, it is simply wrong.

Conclusion

MOL and Global Link's prior owners had a longstanding practice of engaging in split routing. Now, years later, after Global Link's current owners terminated the practice, MOL has decided to file suit against its former collaborators to see if it can recover a windfall as a result of its illegal actions. Because this attempt constitutes an unjust and unreasonable practice, the Commission should not countenance MOL's actions and should award Global Link's current owner reparations for having to defend against MOL's meretricious collection action.

[24] In so doing, however, he recognized that a carrier's seeking of demurrage charges does fall within the Commission's jurisdiction to determine whether rates being charged are just and reasonable. *Id.* at 419.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have delivered a true and correct copy of the foregoing document to the following addressees at the addresses stated by depositing same in the United States mail, first class postage prepaid, and/or via email transmission, this 31st day of May, 2013:

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